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No. 98-1991

Supreme Court, U.S.
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In The

Supreme Court of the United States

PUBLIC LANDS COUNCIL, et al.,

Petitioners,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, DEFENDERS OF WILDLIFE AND THE WILDERNESS SOCIETY IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE

Amici – Natural Resources Defense Council, National Wildlife Federation, Defenders of Wildlife, and The Wilderness Society – are national environmental and conservation organizations with more than 5 million members and supporters combined.[1] Amici's members make extensive use of the public lands administered by the Bureau of Land Management (BLM) for a variety of activities, including hunting, fishing, hiking, and camping. Virtually all BLM lands on which these activities occur are grazed by domestic livestock, and grazing is the single most pervasive influence on the condition of these lands. Grazing profoundly affects the quantity and types of vegetation, the condition of wildlife habitat and the health of wildlife populations, the quality and quantity of water, and the physical appearance of the landscape.

Because the proper management of livestock grazing on BLM lands is of great concern to amici, their members and staff have participated in rulemakings, policy development, land use planning, and allotment management planning for public lands throughout the West for decades. Amici have published reports on BLM's grazing program, testified before Congress, and challenged and defended agency decisions in administrative proceedings as well as in federal courts. Collectively, amici have approximately 75 years of experience participating in public land grazing management.

Amici are participating in this case because the ability of the Secretary of Interior to manage and protect the public lands for the benefit of all Americans would be

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[1] Letters consenting to the filing of this brief have been filed with the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than amici curiae made a monetary contribution to the preparation or submission of this brief.

severely compromised, if this Court were to accept Petitioners' arguments requiring perpetuation of historic levels of livestock grazing.

SUMMARY OF ARGUMENT

In the Taylor Grazing Act of 1934 (Taylor Act), Congress authorized the Secretary of Interior to issue ten-year permits for livestock grazing on the public lands and required the Secretary to give "preference" – i.e., priority – in the issuance of such permits to those who owned land or water rights near the public lands to be grazed. The Taylor Act also required the Secretary to "specify from time to time numbers of stock and seasons of use." 43 U.S.C. § 315b.

In the first decades of administration of the Taylor Act, the Secretary's determinations of the numbers of livestock to be permitted were based primarily on the needs and historic use of the permittees. These determinations reflected the fact that relatively few Americans other than livestock ranchers used the public lands or were affected by their management in the first half of the twentieth century. The Act itself, however, did not require the Secretary to consider only the interests of the permittees. Nor did the Act preclude the Secretary from subsequently reconsidering the initial determinations as conditions changed and as new information, and new users and uses of the public lands, emerged.

In the decades following World War II, use of the public lands for purposes other than livestock grazing increased dramatically. Public lands came to be recognized by the public for their recreational, wildlife, environmental, archaeological, and scientific values as well as their value for livestock production. The broad public interest in the management of these lands received congressional recognition in the Federal Land Policy and Management Act of 1976 (FLPMA), which required the Secretary to manage the public lands for the combination

of uses "that will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). FLPMA required the Secretary to protect environmental resources, and to provide for wildlife habitat and recreation as well as livestock grazing. *Id.* § 1701(a)(8). FLPMA was reinforced by the Public Rangelands Improvement Act of 1978 (PRIA), which instructed the Secretary to manage the public lands "so that they become as productive as feasible for *all* rangeland values," 43 U.S.C. § 1901(b)(2) (emphasis added), including "livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits," *id.* § 1901(a)(1).

Under FLPMA and PRIA, the central mechanism for management of the public lands is the system of land use plans mandated by section 202 of FLPMA, 43 U.S.C. § 1712. FLPMA required the Secretary to manage the public lands in accordance with these plans, *see id.* § 1732(a), and specified that the plans were to determine where livestock grazing would be permitted to occur and where it would not, *see id.* § 1752(c)(1).

In 1978, the Department of Interior promulgated new regulations governing the administration of livestock grazing on the public lands. These regulations reflected the primacy of land use plans under FLPMA by specifying that the allocation of forage among livestock, wildlife, and other uses would be determined in land use plans. *See* 43 Fed. Reg. 29,058, 29,068 (1978), 43 C.F.R. § 4110.2-2(a) (1980). In addition, the 1978 regulations instituted, for the first time, the practice of including in permits a number called "grazing preference." The meaning of this number changed through succeeding versions of the regulations, but the principle that land use plans determined the number of livestock remained. *See* 43 C.F.R. §§ 4110.2-2(a), 4110.3 (1994).

The controversy in this case over the definition of "grazing preference" arose from the Secretary's decision, in regulations promulgated in 1995, to drop the practice of including "preference" numbers in grazing permits.

The 1995 regulations defined "grazing preference" to mean simply "a superior or priority position against others for the purpose of receiving a grazing permit or lease." 43 C.F.R. § 4100.0-5 (1999). The regulations adopted a new term, "permitted use," to mean "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit. . . . " *Id.* These new definitions made no substantive change in the administration of livestock grazing on the public lands. Under the new regulations, as under the previous regulations, the Secretary determines the numbers of livestock through land use planning.

Petitioners attack the new definitions for failure to safeguard "adjudicated forage." According to Petitioners, "adjudicated forage" is the level of livestock grazing that was allocated to ranchers following the passage of the Taylor Grazing Act and can never be changed. They argue that the number of livestock may be reduced below the level of "adjudicated forage" only if there is insufficient forage to support the "adjudicated" number.

Petitioners' argument is without merit. The concept of "adjudicated forage" is without basis in law. What petitioners call "adjudicated forage" was simply the Secretary's initial specification of the numbers of livestock to be permitted on public land grazing allotments. No statute or regulation ever stipulated that these early specifications would never change. To the contrary, the Taylor Act specifically required the Secretary to specify livestock numbers "from time to time." 43 U.S.C. § 315b.

Petitioners' argument, if accepted by this Court, would not just undo regulatory changes promulgated by the Secretary in 1995. It would establish a new regime of public land management under which administrative allocations of livestock forage made a half-century ago would take precedence over all other considerations in public land management. Under this regime, the Secretary would be forced to maintain historic levels of livestock grazing at the expense of wildlife habitat, soil

conservation, water quality, recreation, and all other resources and land uses that the Taylor Act, FLPMA, and PRIA were designed to protect.

ARGUMENT

I. A GRAZING PERMITTEE DOES NOT HAVE A PERMANENT ENTITLEMENT TO GRAZE A SET NUMBER OF LIVESTOCK

A. Petitioners' Concept of "Adjudicated Forage" Has No Basis in Law

The concept of "adjudicated forage" is the central pillar of Petitioners' argument against the Secretary's new definitions. Petitioners argue that the Taylor Act requires the Secretary to safeguard "adjudicated forage," and that the Secretary's definitions are invalid because they do not follow this requirement. Pet. Br. at 17-37. The concept of "adjudicated forage," however, is largely an invention of Petitioners. Neither the Taylor Act nor any other statute refers to "adjudicated forage." Nor is this term found in any regulation of the Interior Department, past or present.

What Petitioners call "adjudicated forage" is simply the livestock numbers authorized in the early years of the Taylor Act. As Petitioners themselves have shown, these early permit numbers were based primarily on the needs of the permittees, with little or no consideration given to other interests or other potential land uses. Pet. Br. at 29-31. *See also* U.S. Department of Interior, Bureau of Land Management, *50 Years of Public Land Management* 4 (1984) ("BLM, *50 Years*"). The numbers were often set by the permittees themselves, through advisory boards composed of ranchers whom they elected and to which local Interior Department officials acquiesced. *Natural*

Resources Defense Council v. Hodel, 618 F. Supp. 848, 856-57 (D.C. Cal. 1985); Coggins & Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and The Taylor Act*, 13 Envtl. L. 1, 56-60 (1982). The early numbers permitted more livestock than could be supported. Coggins & Lindeberg-Johnson at 59.[2]

Nothing in the Taylor Act, any subsequent statute, or any regulation ever stated or implied that these early determinations of permitted livestock numbers were to preclude periodic redeterminations. To the contrary, the Act requires the Secretary to specify numbers of livestock "from time to time." 43 U.S.C. § 315b.

Nor is prior agency practice consistent with the notion of an unchanging level of "adjudicated forage." Between 1958 and 1965, the BLM undertook another "adjudication process" to change permit numbers to reflect new range surveys, BLM, *50 Years* at 13, a fact which Petitioners have failed to recognize in pressing their concept of unchanging "adjudicated forage." Since then, the BLM has continued to adjust livestock numbers down and up. *See, e.g., id.* at 15; 3 Coggins & Glicksman, *Public Natural Resources Law* § 19.03[3][d], at 19-27 (1998).

Petitioners claim that FLPMA's silence on the subject of "adjudicated forage" is "conclusive" evidence of Congress' intent to "preserve[ ] adjudicated forage." Pet. Br.

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[2] Although these early determinations are often called "adjudications," they were not adversary judicial or quasi-judicial proceedings. *See* Coggins & Lindeberg-Johnson at 58. Hearings, which were conducted by the ranchers through the advisory boards, *id.*, occurred only when permittees were dissatisfied, BLM, *50 Years* at 4. Until FLPMA was passed in 1976, there was no statutory basis for participation by other interests besides permittees in the process. *See* 43 U.S.C. § 1701(a)(5).

at 26. But this silence simply indicates that the term "adjudicated forage" had no statutory or regulatory usage or meaning at the time FLPMA was passed, just as it has no such usage or meaning now.

B. Petitioners' Concept of "Adjudicated Forage" is Contrary to the Taylor Grazing Act and Legal Precedent

The Taylor Act specifically provides that the issuance of a grazing permit "shall not create any right, title, or interest, or estate in or to the lands." 43 U.S.C. § 315b. Under Petitioners' concept of "adjudicated forage," however, one of the terms of a grazing permit, namely, the number of livestock, would become a perpetual right. This result would be directly contrary to the explicit mandate of the Act. It would also be contrary to an unbroken string of decisions of this Court and lower courts, stretching back nearly a century, holding that the use of public lands for livestock grazing is a revocable privilege. *See, e.g., United States v. Fuller*, 409 U.S. 488, 491-92 (1973); *Light v. United States*, 220 U.S. 523, 535 (1911); *Diamond Ring Ranch v. Morton*, 531 F.2d 1397, 1404 (10th Cir. 1976); *McNeil v. Seaton*, 281 F.2d 931, 934 (D.C. Cir. 1960).

C. "Grazing Preference" Never Represented an Entitlement to Graze a Particular Number of Livestock

Petitioners argue that the term "grazing preference," as used in Interior Department regulations prior to 1995, encompassed their concept of "adjudicated forage." To the contrary, grazing preference never represented the type of entitlement that Petitioners claim. If this Court were to adopt Petitioners' theory of grazing preference, it

would create a wholly new system of public lands grazing administration.

1. Before 1978, Preference Was Unrelated to Numbers of Livestock

The origin of the term "preference" as applied to livestock grazing is in the Taylor Act:

> *Preference* shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. . . . Such permits shall be for a period of not more than ten years, subject to the *preference* right of the permittees to renewal in the discretion of the Secretary of Interior. . . .

43 U.S.C. § 315b (emphasis added). In this context, the word "preference" clearly is used in its ordinary meaning: "a giving of priority or advantage to one person, country, etc. over others." *Webster's New Universal Unabridged Dictionary* (2d ed. 1979). This use of "preference," referring to *who* rather than *how much*, was reaffirmed in FLPMA, which provides that when a grazing permit expires, its holder "shall be given first priority for receipt of the new permit," so long as the land covered by the permit remains available for grazing. 43 U.S.C. § 1752(c). The Secretary's new definition of "grazing preference" exactly mirrors the original meaning: "*Grazing preference* or *preference* means a superior or priority position against others for the purpose of receiving a grazing permit or lease." 43 C.F.R. § 4100.0-5 (1999) (emphasis in original).

Nothing in the language of the Taylor Act links this "preference" to a particular *number* of livestock. The Act treats numbers as a separate issue, instructing the Secretary to "specify from time to time numbers of stock and seasons of use." 43 U.S.C. § 315b. Moreover, as Petitioners concede, nothing in the Interior Department's regulations before 1978 associated the "preference" with any number of livestock or quantity of forage. *See* Pet. Br. at 8 n.2.

2. Even After 1978, "Grazing Preference" Did Not Represent an Entitlement to Graze a Fixed Number of Livestock

The association between the term "grazing preference" and a particular number of livestock first appeared in Interior Department regulations promulgated in 1978. Those regulations defined "grazing preference" as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee." 43 Fed. Reg. 29,058, 29,068 (1978), 43 C.F.R. § 4100.0-5(o) (1980, 1994). Under the 1978 regulations, however, this "grazing preference" was a variable number, dependent on vegetation allocations in land use plans and on decisions of BLM officials. 43 Fed. Reg. at 29,068, 43 C.F.R. § 4110.2-2(a) (1980). A grazing preference would be "canceled, in whole or in part" if the BLM decided to reduce grazing to achieve the objectives of a land use plan. 43 Fed. Reg. at 29,069 (amending 43 C.F.R. § 4110.3-2(b)).

The regulations were subsequently amended to provide that the "grazing preference" would not vary over time, but instead would be "suspended" in whole or in part if grazing on an allotment were reduced. *See* 45 Fed. Reg. 47,104, 47,105 (1980), 43 C.F.R. § 4110.3-2(b) (1980); 53 Fed. Reg. 10,224, 10,227 (1988); *id.* at 10,233, 10,234, 43

C.F.R. §§ 4110.3, 4110.3-2(c) (1994). The change was purely semantic; the "suspended" part of the preference was unavailable for use by the permittee unless and until it was restored by decision of the BLM. 53 Fed. Reg. at 10,234, 43 C.F.R. § 4110.3-2(c) (1994).

Under the regulations as revised in 1988 (which will hereinafter be called the "prior regulations," because they were in effect until the 1995 rulemaking under review here), the actual number of livestock permitted to graze was called the "active use," which was defined as "the current authorized livestock grazing use." 53 Fed. Reg. at 10,233 (1988); 43 C.F.R. § 4100.0-5 (1994). Any rational expectation of an ability to place livestock on the ground, any expectation of a stream of income from livestock production, any ability to repay a loan, and any rational basis for making a loan, was found only in the active use, not in the "grazing preference."

The severely limited meaning of the "grazing preference" as defined in the prior regulations was best summarized, perhaps inadvertently, by Judge Tacha of the Tenth Circuit in her dissenting opinion in the decision under review:

> In short, the grazing preference represented the upper limit that a permittee could graze if optimal conditions prevailed, all relevant land could be placed in active use, *and the Secretary allowed him or her to graze up to that upper limit.*

Public Lands Council v. Babbitt, 167 F.3d 1287, 1310 (10th Cir. 1999) (Tacha, Circuit Judge, dissenting) (emphasis added). Petitioners stress this explanation, quoting it as the keystone of their argument. Pet. Br. at 18. (They also omit the critical qualification at the end of the sentence, and they misrepresent it as the "plain language of the TGA." *Id.* In fact, the Taylor Act contains no such words.)

Examination of this explanation confirms that the grazing preference did not actually affect the number of livestock on the ground. It represented "the upper limit that a permittee could graze *if . . . the Secretary allowed him or her to graze up to that upper limit.*" In other words, regardless of the preference, the permittee could graze the number of livestock that the Secretary allowed and no more.

Thus, the majority below was correct when it found that the Secretary's 1995 revised definition of "grazing preference" made no substantive change in the law. *Public Lands Council v. Babbitt*, 167 F.3d at 1297-98. It merely removed a symbolic number that was unrelated to actual authorized levels of livestock grazing.

D. Since 1978, Land Use Plans Have Determined Permitted Numbers of Livestock

Petitioners attack the Secretary's new definition of "permitted use" because it bases authorized numbers of livestock on land use plans. Pet. Br. at 18, 34-35. But the dependence of livestock numbers on land use plans is not new; it has been the rule since 1978.

The 1978 regulations specified that the allocation of forage between livestock, wildlife, and other uses would be determined in land use plans. *See* 43 Fed. Reg. at 29,068; 43 C.F.R. § 4110.2-2(a) (1980). When the regulations were revised in 1988, that principle did not change. *See* 53 Fed. Reg. at 10,226; *id.* at 10,233, 43 C.F.R. § 4100.0-8 (1994). The regulations made crystal-clear that active use was determined not by historic "adjudicated forage" but by land use plans:

> Grazing preference shall be specified in all grazing permits or grazing leases. It shall include both active use and suspended use. *Active use*

> *shall be based upon the amount of forage available for livestock grazing established in the land use plan* as defined in 43 CFR 1601.0-5(k).

53 Fed. Reg. at 10,233, 43 C.F.R. § 4110.2-2(a) (1994) (emphasis added).

Petitioners insist that this provision applied only to "*newly adjudicated* grazing privileges" created after the passage of FLPMA. Pet. Br. at 30 (emphasis in original). But there is no support for such an artificially restricted reading of this rule; they simply made it up. By its plain terms, this provision applied to "*all* grazing permits or grazing leases" (emphasis added). Moreover, another provision of the same regulations specifically provided that the BLM could *change* the grazing preference status (e.g., move part or all of the preference from active to suspended status, *see* 53 Fed. Reg. at 10,227) whenever the change is "specified in an applicable land use plan." 53 Fed. Reg. at 10,233, 43 C.F.R. § 4110.3 (1994). Thus, the prior regulations left no doubt that active use, for pre-FLPMA as well as new permits, was determined by land use plans, not by the preference or by "adjudicated forage." The Secretary's new definition of "permitted use" simply continues this practice.

E. Under the Prior Regulations, The Secretary Had Broad Discretion to Reduce Livestock Numbers for Many Reasons Besides Unavailability of Forage

Petitioners imply that a permittee could be denied permission to graze the full amount of the preference only if the condition of the range and associated range improvements was such that the full amount could not be accommodated. Pet. Br. at 31. Thus, in Petitioners' view, before the new regulations, the Secretary was without

authority to limit livestock grazing for the benefit or protection of other users, uses, or resources of the public lands.

Again, Petitioners have mischaracterized the prior regulations. Those regulations reflected the Secretary's broad statutory authority to limit livestock grazing for a variety of reasons besides simple unavailability of forage. They required periodic review of permitted numbers of livestock and authorized changes in the status of the grazing preference – i.e., reductions in active use – whenever such changes were "either specified in an applicable land use plan or necessary to manage, maintain, or improve rangeland productivity." 53 Fed. Reg. at 10,233, 43 C.F.R. § 4110.3 (1994). This language "clearly indicated that changes in active use may be triggered by various management objectives." 53 Fed. Reg. at 10,228. "Productivity" does not refer just to livestock production. The words "manage, maintain, or improve rangeland productivity" are taken from PRIA, in which Congress "establishe[d] and reaffirm[ed] a national policy and commitment to . . . manage, maintain, and improve the condition of the public rangelands so that they become as productive as feasible for *all rangeland values*," 43 U.S.C. § 1901(b)(2) (emphasis added), specifically including "wildlife habitat, recreation, forage, and water and soil conservation benefits" as well as livestock, *id.* § 1901(a)(1). *See also id.* § 1902(d) (defining "range condition" to relate to soil quality, wildlife habitat, and watershed and plant communities as well as forage). By using PRIA's words, the prior regulations made clear that, even if forage was physically "available," active use could be reduced in order to protect or promote numerous alternative uses and values of the public lands.

F. The Taylor Grazing Act, FLPMA, and PRIA Authorize and Require the Secretary to Periodically Reassess Numbers of Livestock

Because Petitioners' claim that the challenged regulations represent a significant break from prior practice is untrue, Petitioners can prevail in their challenge to the Secretary's new definitions of "grazing preference" and "permitted use" only by demonstrating that both the new regulations *and* the prior regulations are contrary to law. Petitioners must demonstrate that the applicable statutes, in contrast to both the new and prior regulations, require the Secretary to perpetually recognize and honor a fixed level of "adjudicated forage" that cannot be changed once it is established.

This Petitioners cannot do. The suggestion that a one-time "adjudication" of authorized numbers of livestock is forever binding and unchangeable is completely contrary to the Taylor Act, to FLPMA, and to PRIA.

1. The Taylor Act and FLPMA Require Periodic Reassessment of Permitted Livestock Numbers

The Taylor Act instructs the Secretary to reassess livestock numbers "from time to time." 43 U.S.C. § 315b. This mandate was reinforced by FLPMA, which contains three explicit commands that cannot be reconciled with the notion that the Secretary must honor any fixed and unchangeable number of livestock associated with a grazing permit. First, FLPMA reiterates that grazing permits shall have a maximum term of ten years. *See* 43 U.S.C. §§ 1752(a), (b). Second, FLPMA instructs the Secretary to "specify" in each ten-year grazing permit "the number of animals to be grazed and the season of use." *Id.* § 1752(e); *NRDC v. Hodel*, 618 F. Supp. at 858-60. Third, FLPMA

provides that the Secretary may change the authorized number of livestock even during the term of a permit:

> . . . he may reexamine the condition of the range *at any time* and, if he finds on re-examination that the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary concerned deems necessary.

43 U.S.C. § 1752(e) (emphasis added).

2. Because FLPMA and PRIA Authorize the Secretary to Eliminate Grazing on Portions of the Public Lands, It Follows that He Has Authority to Reduce Livestock Numbers

FLPMA and PRIA both give the Secretary broad authority to determine that grazing should be eliminated altogether on portions of the public lands. This authority cannot be reconciled with Petitioners' notion of a perpetual and unchanging level of "adjudicated forage."

Section 402(c) of FLPMA grants the holder of an expiring grazing permit first priority for receipt of a new permit *"[s]o long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 202 of this Act."* 43 U.S.C. § 1752(c) (emphasis added). Congress intended not only that land use plans would determine permitted levels of grazing, but also that they would totally eliminate grazing from some areas.

Section 402(g) of FLPMA requires compensation to a permittee for his interest in certain range improvements "[w]henever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public

purpose." 43 U.S.C. § 1752(g). This language contemplates complete cancellation of a grazing permit when the Secretary determines that the covered lands would best be used for purposes other than grazing.

PRIA made the Secretary's authority to eliminate grazing in selected areas even more explicit:

> Except where the land use planning process required pursuant to section 202 of the Federal Land Policy and Management Act (43 U.S.C. 1712) determines otherwise *or the Secretary determines, and sets forth his reasons for this determination, that grazing uses should be discontinued (either temporarily or permanently) on certain lands,* the goal of such management shall be to improve the range conditions of the public rangelands. . . .

43 U.S.C. § 1903(b) (emphasis added).

These explicit authorizations in FLPMA and PRIA for the Secretary to eliminate livestock grazing on portions of the public lands cannot be reconciled with the notion that grazing permittees have a permanent and unchangeable entitlement to a quantity of "adjudicated forage."

3. Congress Recently Reaffirmed the Authority of the Secretary to Reduce or Eliminate Grazing

Last year, Congress again reaffirmed the authority of the Secretary to reduce, or even eliminate, grazing on portions of the public lands. In appropriating funds for the Interior Department for Fiscal Year 2000, Congress extended expiring grazing permits until the Secretary completes reviews required by the National Environmental Policy Act and other environmental laws, "at which time such permit[s] or lease[s] may be canceled, suspended or modified, in whole or in part" to meet the

requirements of such laws. District of Columbia, 2000, Pub. L. 106-113, Div. B, § 1000(a)(3) (passing by reference H.R. 3423, § 123 (Interior Appropriations)).

II. THE SECRETARY'S REGULATIONS ADEQUATELY SAFEGUARD GRAZING PRIVILEGES

The Taylor Act directs that "grazing privileges recognized and acknowledged shall be adequately safeguarded. . . . " 43 U.S.C. § 315b. Petitioners argue that this requirement constitutes a mandate to safeguard their concept of "adjudicated forage." Pet. Br. at 18-20. As discussed above in Section I, Petitioners' concept of "adjudicated forage" is contrary to the plain language of the Act, as well as to other statutes. Moreover, since the concept did not exist in 1934, interpreting the Taylor Act to incorporate it would be ahistorical. In any event, their view of what "safeguard" means is erroneous.

The Taylor Act requirement to "safeguard[ ]" grazing privileges

> means that the BLM must observe statutory preferences and priorities in granting and renewing permits, and must protect the rancher's permitted allotment from trespasses or claims by competing livestock raisers.

3 Coggins & Glicksman, *supra*, § 19.02[1][c], at 19-11 to 19-12. The Secretary's rules do this and more.

The current grazing rules, as demonstrated above, observe the grazing preference in accord with the Taylor Act. They also provide each permittee with the exclusive privilege of grazing a designated area, or allotment, of public land. *See* 43 C.F.R. § 4100.0-5 (1999) (definition of "allotment"). Anyone other than the permittee who grazes livestock on the permittee's allotment is subject to

civil and criminal penalties and impoundment and sale of his livestock. *Id.* §§ 4140.1(b)(1)(i), 4150.4, 4170.1, 4170.2.

Under the Secretary's regulations, other protections for permittees include rights to consultation, notice, protest, and two levels of appeal before the terms or conditions of a grazing permit, including permitted numbers, are changed. 43 C.F.R. §§ 4130.3-3, 4160.1, 4160.2, 4160.4, 4.476 (1999). These substantive and procedural provisions of the Secretary's regulations more than satisfy the Taylor Act's requirement to safeguard grazing privileges.

III. THE SECRETARY IS NEITHER REQUIRED NOR ALLOWED TO SET PERMITTED LIVESTOCK NUMBERS SOLELY ON THE BASIS OF THE NEEDS AND HISTORIC USE OF PERMITTEES

Petitioners insist that the Secretary of Interior must honor historic livestock numbers in managing the public lands, to the exclusion of other interests and uses of those lands. In essence, they contend that livestock grazing has been, now is, and must always remain the dominant use of the public lands.

Petitioners' claims are without merit. Their analyses of the Taylor Act, FLPMA, and PRIA ignore explicit statutory language, congressional goals, and legislative history which conflict with their claims. Under these statutes, the public lands must be managed for a variety of different uses, including but not limited to livestock grazing. Requiring the Secretary to perpetually recognize and honor livestock numbers set decades ago would prevent him from fulfilling the management mandates of these laws.

A. The Public Lands Serve Numerous Important Values and Uses in Addition to Livestock Grazing

The public rangelands administered by the BLM include mountains, forests, deserts, grasslands, and canyons, and provide a wealth of important public resources in addition to livestock forage. *See* U.S. Department of Interior, Bureau of Land Management, *Rangeland Reform '94 Draft Environmental Impact Statement* 3-5 to 3-7 (1994) ("BLM, *'94 DEIS*"). These lands provide habitat for a host of fish and wildlife species, including big game and small game animals, as well as scores of threatened and endangered species. *See, e.g., id.* at 3-38 to 3-41; 3-49 to 3-50. They support countless species of vegetation. *Id.* at 3-15 to 3-23. Despite their general aridity, they contain thousands of miles of streams. *See* Department of Interior, Bureau of Land Management, *Public Rewards from Public Lands* 9 (1997) ("BLM, *Public Rewards*"). They also include 1 million acres of riparian areas, the areas immediately adjacent to streams, rivers, and lakes that perform key biological functions and are critical for fish, birds, and many endangered and sensitive plants and animals. BLM, *'94 DEIS* at 3-30 to 3-31.

BLM-managed lands also include some 2,000 miles of designated National Wild and Scenic Rivers, 5.2 million acres of congressionally designated Wilderness Areas, and more than 17 million acres that the BLM has determined possess wilderness characteristics. BLM, *Public Rewards* at 9. They also contain hundreds of thousands of archaeological and cultural sites. BLM, *'94 DEIS* at 3-53. Millions of acres of these lands are spectacularly scenic. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 Idaho L. Rev. 555, 559 (1994). In 1996, nearly 60 million people visited these

lands for recreational purposes such as hunting, fishing, hiking, and wildlife watching. BLM, *Public Rewards* at 2, 7. Although the BLM permits livestock to graze over 90 percent of the lands it manages, the economic value of recreational uses of these lands far exceeds the value of livestock forage that they provide. *See, e.g.*, Feller, *supra*, at 559-60.[3]

B. The Taylor Act Does Not Require the Secretary to Set Livestock Numbers Solely on the Basis of Permittees' Needs and Historic Use

Petitioners' contention that the Taylor Act is single purpose legislation, motivated solely by congressional concern for the livestock industry, is contrary to the Act's terms and long-standing judicial decisions. The Taylor Act's purposes included the prevention of "overgrazing and soil deterioration. . . . " Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269. It is "a multiple purpose law" that seeks to accomplish more than promoting the stability of the public land livestock industry. *LaRue v. Udall*, 324 F.2d 428, 430 (D.C.Cir. 1963), *cert. denied*, 376 U.S. 907 (1964). The Taylor Act's conservation goal is clear, *see, e.g., id.* at 430, although the statute is "not purely environmental," *Natural Resources Defense Council, Inc. v. Morton*, 388 F.Supp. 829, 833 (D.D.C. 1974),[4] *aff'd*, 527 F.2d 1386

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[3] The public lands supply only about two percent of the total feed consumed by beef cattle in the U.S. BLM, *'94 DEIS* at 3-68.

[4] As one of two defendant-intervenors in this case, Petitioner Public Land Council claimed unsuccessfully that the Taylor Act's "licensing program is an operative and effective method of protecting the environment of the public lands," one directly analogous to the National Environmental Policy Act. 388 F.Supp. at 833.

(D.C.Cir. 1976), *cert. denied*, 427 U.S. 913 (1976). The Taylor Act does not, as claimed, direct the Secretary to defer to the needs and historic use of permittees. Rather, in enacting it, Congress, "for the first time," "directed the *Secretary*, and not the ranchers, to rule the range." *NRDC v. Hodel*, 618 F.Supp. at 856 (emphasis in original).

C. FLPMA and PRIA Require The Public Lands to be Managed for Multiple Values and Uses

FLPMA and PRIA require the Secretary to manage the public lands for more than just livestock. Rather than preserve the status quo for livestock, together they "require radical revisions in the traditional theory and practice of public rangeland management." Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 Envtl. L. 1, 4 (1983).

FLPMA "has been called the BLM's Organic Act because it is the most comprehensive legislation concerning BLM's programs ever enacted by the Congress." BLM, *50 Years* at 9.[5] FLPMA "superimposes a new management system, with more diverse goals and emphases." Coggins, *supra*, at 5.

In FLPMA, Congress recognized the broad public interest in the management of the public lands. It declared a national policy that

> the public lands be managed in a manner that will protect the quality of scientific, scenic,

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[5] Petitioners' assertion that, in this document, BLM "acknowledged that FLPMA made only 'minor adjustments in [the TGA]'," Pet. Br. at 10, is factually incorrect as well as a misstatement of FLPMA's significance. The alleged acknowledgment cannot be found on the page cited or anywhere in the document.

> historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

43 U.S.C. § 1701(a)(8). To execute this policy, Congress directed the Secretary to manage the public lands under the principle of "multiple use," *id.* § 1732(a), which it defined as the combination of uses "that will best meet the present and future needs of the American people," *id.* § 1702(c). This definition makes it plain that, in managing the public lands, the BLM must consider more than just the needs of grazing permittees. "FLPMA emphatically rejects the grazing-as-dominant-use tradition in public land management. . . . " Coggins, *supra*, at 15. Moreover, Congress explicitly warned against management to meet only *economic* needs; it directed the BLM to consider "the relative values of the resources and not necessarily . . . the combination of uses that will give the greatest economic return or the greatest unit output." *Id.* § 1702(c).

The BLM's first post-FLPMA grazing rulemaking in 1978 acknowledged that grazing was no longer the dominant use:[6] "Under the [BLM's] planning system, no particular land or resource use is given preference. . . . [E]ach use is given equal consideration with all other uses. . . . " 43 Fed. Reg. at 29,058. Later rulemakings have affirmed that FLPMA and PRIA require that livestock grazing be

[6] As BLM has noted, "[a] primary criticism of the early BLM was that its actions were single-use oriented." BLM, *50 Years* at 9.

managed pursuant to FLPMA's multiple use principle. *See, e.g.*, 53 Fed. Reg. at 10,224-25 (1988).

In PRIA, Congress gave the Secretary more explicit direction to manage the public rangelands for a variety of purposes. PRIA established "a national policy and commitment" to "manage, maintain and improve the condition of the public rangelands" for "all rangeland values," 43 U.S.C. § 1901(b)(2), including wildlife habitat, recreation, and water resources, *see id.* §§ 1901(a)(1), 1902(d).

D. FLPMA and PRIA Require Livestock Levels to be Set Through Land Use Planning

Under FLPMA and PRIA, land use plans are the central mechanism for management of the public lands, including their management for livestock grazing purposes. Section 202 of FLPMA directs the Secretary to

> develop, maintain, and when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

43 U.S.C. § 1712(a). The public lands must be managed in accordance with these land use plans. *See id.* § 1732(a).

FLPMA also directs that land use planning is to determine where livestock will and will not be permitted to graze. It makes renewal of expiring grazing permits explicitly contingent upon the lands remaining available for grazing under land use plans. *See* 43 U.S.C. § 1752(c).[7]

[7] Petitioners' complaints about the BLM's land use planning process, *see, e.g.*, Pet. Br. at 35-36, are misplaced, since it

PRIA affirms the centrality of land use plans in connection with the paramount goal of range condition improvement. It instructs the Secretary to manage the public lands "so that they become as productive as feasible for all rangeland values in accordance with . . . the land use planning process" established in FLPMA. 43 U.S.C. § 1901(b)(2). In addition, PRIA explicitly authorizes decisions to discontinue grazing to be made in "the land use planning process." *Id.* § 1903(b).

The BLM has repeatedly acknowledged the key role of land use plans in the management of grazing. Its 1978 rulemaking emphasized that the grazing regulations "apply to the administration of livestock grazing . . . *after it has been determined* through the planning process what areas and *how much forage* are available for livestock grazing." 43 Fed. Reg. at 29,058 (emphasis added). Subsequent rulemakings also stressed this point, *see, e.g.*, 53 Fed. Reg. at 10,225 (" . . . through land use planning, livestock grazing has been determined to be compatible with other uses and land use planning objectives"), as well as that grazing activities and management actions must conform to land use plans, *id.* at 10,226.

In sum, Congress commanded that the land use planning process would determine whether livestock grazing should be allowed in a particular area and, if so, at what level. Petitioners' claims that their historic numbers must be maintained are flatly inconsistent with this command.

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was Congress, in FLPMA, that detailed the process and the ways land use plans were to be used in connection with grazing and other land uses. *See, e.g.*, 43 U.S.C. §§ 1712, 1713, 1732.

E. A Requirement to Maintain Historic Livestock Numbers Would be Inconsistent with Mandates for Protection of Many Public Values

Congress, the Interior Department, the BLM, and other federal agencies have recognized that livestock grazing has caused, and is causing, adverse impacts to many public land resources. In many cases, alleviating these impacts will require reductions in livestock numbers. Requiring the Secretary to maintain historic numbers would prevent him from protecting the public lands and improving their conditions as he has been directed to do by Congress. Such a requirement would also prevent compliance with other applicable laws.

1. Excessive Grazing Damages Numerous Public Resources

Overgrazing leads to "soil erosion, watershed destruction, and the loss of native grasses and other vegetation that provide forage for livestock and wildlife." U.S. General Accounting Office, *Rangeland Management: More Emphasis Needed on Declining and Overstocked Grazing Allotments* 10 (1988) ("GAO, *Overstocked Allotments*"). "[O]ne of the principal goals of the Taylor Act" was to prevent overgrazing and soil deterioration, although, by the 1970s, "it was the view of many experts that the BLM failed to achieve" that goal. *NRDC v. Hodel*, 618 F.Supp. at 856-57. In FLPMA, Congress "[found] that a substantial amount of the Federal range lands is deteriorating in quality," 43 U.S.C. § 1751(b)(1), a finding that constitutes "an implicit denunciation of past practices of the BLM in managing public grazing lands." *NRDC v. Hodel*, 618 F.Supp. at 858. *See also id.* at 856-57 (describing pre-FLPMA range conditions).

> In PRIA, Congress found and declared that
>
> vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason are in an unsatisfactory condition;

43 U.S.C. § 1901(a)(1). Its finding was based on the BLM's own studies which revealed that, "more than 40 years" after enactment of the Taylor Act, "more than 80 percent of the range is still in less than satisfactory condition." H.R. Rep. No. 95-1122, at 10 (1978). *See also* S. Rep. No. 95-1237 at 5-6, *reprinted in* 1978 U.S.C.C.A.N. 4069. Congress further found that "such rangelands will remain in an unsatisfactory condition and some areas may decline further under present . . . management," with devastating potential consequences to resources including soils, quantity and quality of "scarce western water supplies," "important and frequently critical fish and wildlife habitat" and "the value of such lands for recreational and esthetic purposes." 43 U.S.C. §§ 1901(a)(2)-(3).

Since enactment of PRIA and FLPMA, Congress' findings have been confirmed by the BLM and other agencies. For example, as summarized by the National Science Foundation's National Research Council, environmental impact statements prepared by the BLM have revealed various kinds of "rangeland degradation," including, "soil erosion," "soil compaction," "the spread of introduced weed species," "reduced water quality and wildlife habitat," and "degradation of riparian habitat." National Research Council, *Rangeland Health: New Methods to Classify, Inventory, and Monitor Rangelands* 25 (1994). The environmental statement the BLM prepared in connection with the rulemaking at issue in this case acknowledged that ecologically critical riparian areas, "[t]he most biologically diverse habitats on federal land,"

were suffering significant damage from livestock. BLM, *'94 DEIS* 3-30, 3-32, 3-43. *See also* BLM, *Rangeland Reform '94 Final Environmental Impact Statement* 26 (66% of riparian areas functioning at risk or non-functioning); U.S. General Accounting Office, *Public Rangelands: Some Riparian Areas Restored but Widespread Improvement Will Be Slow* (1988) ("GAO, *Riparian Restoration*"); Chaney, Elmore & Platts, *Livestock Grazing on Western Riparian Areas* 5 (U.S. Environmental Protection Agency, 1990) (in late 1980s "riparian areas throughout much of the West were in the worst condition in history"). Habitat conditions for riparian-dependent wildlife and fish as well as other species have been degraded by livestock. BLM,*'94 DEIS* at 3-42 to 3-43, 3-49. Authorized grazing practices have also damaged BLM-administered wild and scenic rivers. *Oregon Natural Desert Association v. Singleton*, 47 F.Supp. 2d 1182, 1185-86, 1189 (D. Or. 1998).

Overgrazing remains a problem. The trend or change in condition of rangeland vegetation is declining on almost 17 million acres of rangelands and static on almost 92 million. BLM,*'94 DEIS* at 3-27.

2. The Ability to Reduce Livestock Numbers Is Essential to Proper Resource Management

Achieving Congress' mandates for improved productivity of public land resources, as well as for balanced management consistent with the multiple use principle, will require reductions in livestock numbers in some – although not necessarily all – cases. "Control of animal numbers is the most important single tool available to the rangeland manager." Heady, *Rangeland Management* 113 (1975). *See also* Clary & Webster, *Managing Grazing of Riparian Areas in the Intermountain Region* 6 (U.S. Forest

Service, 1989) (citing studies showing that "stocking rate is and always will be the major factor affecting the degradation of rangeland resources"); 3 Coggins & Glicksman, *supra*, § 19.01[2], at 19-6 ("The first requisite to improving range condition is reducing grazing levels to carrying capacity or below."). The Secretary must be able to reduce livestock numbers to curtail overgrazing. GAO, *Overstocked Allotments* at 10, 29-30.[8] Reductions are a principal tool for alleviating grazing damage to ecologically critical riparian areas. GAO, *Riparian Restoration* 34-35; Chaney et al., *supra*, at 4. The ability to reduce livestock numbers is also key to protection of other resources, such as vegetative communities, archaeological sites, and recreational and scenic values, which can suffer damage even when livestock use is within carrying capacity. *See, e.g.*, Feller, *supra*, at 561-63.

The Secretary needs the ability to reduce livestock numbers to comply with other statutes in addition to FLPMA and PRIA. Reductions, and perhaps even elimination of grazing in some areas, may be necessary to comply with the National Environmental Policy Act, *see, e.g., NRDC v. Morton*, 388 F.Supp. at 840 n.22 (the "crucial questions are whether [deterioration] can be allowed to continue and whether it will be exacerbated by continued grazing"), the Wild and Scenic Rivers Act, *see, e.g., Oregon Natural Desert Association v. Singleton*, 47 F.2d at 1191-92,

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[8] See also H.R. Rep. No. 1122 at 11 ("The committee is fully aware that overgrazing exists in many areas, and must be curtailed."); 122 Cong. Rec. H7609 (daily ed. July 22, 1976) (Rep. Eckhardt) (emphasizing the BLM's duty "to prevent overgrazing and halt the deterioration of public grazing lands"); *id.* at H7609-10 (Rep. Melcher) ("the responsibility of canceling or modifying a lease if there is overgrazing is inherent with the Secretary of the Interior").

and the Endangered Species Act, *see, e.g.*, U.S. Fish and Wildlife Service, *Desert Tortoise (Mojave population) Recovery Plan* 11 (1994) ("time and space restrictions" imposed on livestock use); *Pacific Rivers Council v. Thomas*, 873 F.Supp. 365, 371-72 (D. Idaho 1995) (grazing halted to protect habitat for listed salmon species).

In sum, the ability to adjust livestock numbers is essential to achieving Congress' multiple use and improvement mandates for the public lands as well as other statutory mandates. Adoption of petitioners' legal theory would severely constrain, if not totally eliminate, the Secretary's ability to utilize this fundamental management tool to comply with these mandates.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals with respect to the Secretary's definitions of "preference" and "permitted use" should be affirmed.

Respectfully submitted,

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